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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-404

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal from the Supreme Court of New Jersey

BRIEF FOR APPELLEES

JOHN J. DEGNAN,
Attorney General of New Jersey,
Attorney for Appellees, State of New Jersey, Department of Environmental Protection of the State of New Jersey and Commissioner of the Department of Environmental Protection of the State of New Jersey,
State House Annex,
Trenton, New Jersey 08625.

STEPHEN SKILLMAN,
Assistant Attorney General,
Of Counsel and on the Brief.

DEBORAH PORITZ,
NATHAN EDELSTEIN,
Deputy Attorneys General,
On the Brief.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

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Appellees.

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BRIEF FOR APPELLEES

Question Presented

Is a state which allows land to be used for the disposal of waste generated within its boundaries compelled either by the Federal Resource Conservation and Recovery Act of 1976 or the Commerce Clause to allow that land also to be used for the disposal of waste generated in other states?

Counter-Statement of the Case

On January 2, 1974, the Governor of New Jersey signed into law chapter 363 of the Laws of 1973, which was to become effective on February 1, 1974. This legislation contained an express finding that:

> ". . . the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited." N.J.S.A. 13:1I-9 (App. 75).

Based on this finding the New Jersey Legislature directed that:

> "No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner [Commissioner of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State." N.J.S.A. 13:1I-10 (App. 75-76).

Pursuant to the authority of chapter 363 the Commissioner of the New Jersey Department of Environmental Protection promulgated rules and regulations, which were to become effective concurrently with the statute, providing that:

> "No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This section shall not apply to:
>
> "(a) Garbage to be fed to swine in the State of New Jersey;
>
> "(b) Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;
>
> "(c) Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70 per cent of the thru-put of any such facility is to be separated or processed into usable secondary materials; and
>
> "(d) Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be

> treated, processed or recovered in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State." N.J.A.C. 7:1-4.2 (App. 81)

The complaint in this matter, which was filed with the Superior Court of New Jersey, Law Division, on January 22, 1974, sought a declaration that chapter 363 is violative of the United States and New Jersey Constitutions and temporary and permanent injunctive relief restraining the Department of Environmental Protection from enforcing the legislation (App. 82-104). The case was brought before the trial court on cross-motions for summary judgment.

In support of the State's cross-motion for summary judgment, a report was submitted, entitled "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management," which appropriately describes the crisis in solid waste disposal leading to the enactment of the ban on the dumping of waste originating out of state:

> "Recent studies indicate that sanitary landfills have environmental problems all their own. We have learned that keeping a landfill truly 'sanitary' involves much more than daily soil cover and the use of massive machinery, although these by no means are unimportant. In New Jersey virtually all sanitary landfills can be expected to produce leachate, a noxious and highly polluted liquid which is seldom visible and frequently pollutes our ground and surface waters. The natural decomposition process which occurs in sanitary landfills generates a mixture of gases. Much of this mixture is composed of methane, the same 'natural' gas used in cooking and heating.
>
> • • •

> "There are some 340 landfills now disposing of solid waste in New Jersey, and almost all were in existence at the time the Solid Waste Management Act (1970) became effective. Most of these operations are situated on lands once considered 'marginal.' Tidal lands, floodplains, and abandoned sand and gravel mines have been favored as locations for disposing of our wastes because such lands were inexpensive, and it was felt that sanitary landfill was a suitable method of reclaiming those lands. While it is possible to bring these areas up to a more useful grade through sanitary landfill, little consideration has been given to the wisdom of doing so.
>
> • • •
>
> "Sanitary landfills produce leachate when water infiltrates the fill. More than half of our wastes consist of paper or other absorptive materials. A sanitary landfill is frequently likened to a sponge because of this ability to absorb and hold liquids. Yet, like the sponge, the absorptive capacity of a sanitary landfill is finite. Water is introduced into the fill through a variety of mechanisms. Natural rainwater percolation, off-site drainage into the fill, natural fluctuations in the groundwater level, tidal influences, and the water produced through the decomposition of the organic wastes themselves all are absorbed by the landfill 'sponge.'
>
> "Eventually, the landfill becomes saturated, and can absorb no more liquid. At that point, each ounce of liquid introduced to the fill causes a corresponding ounce of leachate to be displaced and leave the fill. Leachate produced in a sanitary landfill is a highly polluted liquid characteristic of the

waste in which it was produced. Leachates from municipal wastes (household and commercial wastes) are typically 50 to 100 times as polluting as raw sewage, and landfills have been known to leach for as long as 20 years, although contaminant concentrations can be expected to decrease in time.

• • •

"While examples of leaching sanitary landfills have been studied and documented for many years, only recently have researchers begun to study leachate generation in detail. As recently as 1972, the U.S. Environmental Protection Agency, in its report entitled 'Sanitary Landfill Design and Operation,' stated the following:

> 'Some investigators believe that even in a sanitary landfill, leachage production is inevitable and that some leachate will eventually enter surface water or groundwater. This has not been proven but neither has the opposite view. The present philosophy held by the Office of Solid Waste Management Programs, most State solid waste control agencies, and many experts in the field is that through sound engineering and design, leachate production and movement may be prevented or minimized to the extent that it will not create a water pollution problem.'

"One particularly disconcerting feature of leachate production is the time delay created by the absorptive character of the wastes. Frequently, landfills do not begin leaching until some time after the fill has been completed and the waste has reached its saturation level. Climatic conditions in New Jersey are favorable to leachate production and, unless extreme measures are taken to prevent

any liquid from infiltrating the waste, leachate will be produced in New Jersey's landfills. The problem then becomes one of preventing the pollution of our ground and surface waters by the leachate.

"Water pollution from sanitary landfills is determined by a number of factors, including the site hydrology, geology, topography, method of operation, the type of wastes received for disposal, and other physical and chemical factors which vary from fill to fill. Clearly, then, the potential for polluting our ground and surface water resources should be a strong factor in the selection of a sanitary landfill site, and in its design and method of operation.

• • •

"Gas is produced in sanitary landfills as a product of the decomposition process. During the early stages of decomposition, air is present in the fill and the decomposition process is therefore called 'aerobic.' The principal gas produced during aerobic decomposition is carbon dioxide (CO_2).

"As the oxygen in the fill is consumed to produce CO_2, the decomposition process becomes increasingly anaerobic (the absence of air). The gaseous products of anaerobic decomposition are CO_2 and methane (CH_4). In the latter stages of decomposition almost half the gas present is methane. Methane is the 'natural gas' commonly used for cooking and heating in our homes, and is explosive when present in air at concentrations between 5 and 15 percent. Since methane is only produced in landfills where there is no oxygen present, it does not pose an explosive threat in the fill itself. Methane is, however, much lighter than air and,

therefore, tends to migrate upward in a sanitary landfill. The gases in the landfill are normally under a slight pressure, and the methane would therefore travel from the fill along the path of least resistance, sometimes moving laterally where it cannot easily vent to the atmosphere. For this reason, methane can constitute an explosion hazard if it is allowed to accumulate in enclosed structures on or near a sanitary landfill.

• • •

"The introduction of bulk liquids into a landfill can greatly affect the generation of leachate within the fill, and leaching from fills which have accepted hazardous wastes can have a particularly devastating effect on the quality of our resources. For these reasons, the proposed regulations would require any sanitary landfill which accepts such wastes to establish and maintain water monitoring facilities, and to undertake immediate corrective measures should the monitoring disclose contamination. Additionally, the proposed regulations would ban the disposal of hazardous wastes and bulk liquids at conventional sanitary landfills after March 15, 1975. This, it is felt, is sufficient lead-time for the construction of recovery, treatment and disposal facilities with sufficient safeguards to properly handle hazardous and bulk-liquid wastes.

• • •

"In 1971, at least 1½ million tons of solid waste generated outside of New Jersey were buried within this State. The failure on the part of our neighboring states to provide suitable disposal facilities of their own has consumed thousands of landfill acres in New Jersey, has contributed to the de-

gradation of our environment, and is increasing the cost of disposal for our own municipalities. The depletion of landfill space and the enforcement of stringent air quality standards in the metropolitan regions of our neighboring states is increasing the volume of out-of-state waste disposed of in New Jersey at an ever-increasing rate.

"It is estimated that our metropolitan counties of Bergen, Essex, Hudson, Passaic and Union have no more than three years of landfill space remaining. In an effort to slow down the landfill depletion process, the Department of Environmental Protection, in conjunction with the Hackensack Meadowlands Development Commission, recently instituted a ban on the disposal of out-of-state waste within the Hackensack Meadowlands Development Commission district. The Hackensack Meadowlands ban caused collectors of out-of-state waste to travel into the suburban regions of the state, thus threatening the life expectancy of those disposal sites. This increased the cost of solid waste collection and disposal for New Jersey's residents, for when nearby disposal sites are depleted, collectors must haul their waste longer and longer distances into the State's suburbs and rural areas.

"Since the Solid Waste Management Act took effect in 1970, over forty landfill sites have closed. During that same period only nine new disposal sites have commenced operations and, of these, only three accept general municipal-type wastes for disposal. Concurrently, more and more landfill operations are discovering that their acreage includes unusable flood plain or tidal marsh areas and original estimates of their waste capacity were erroneously high. The lands now utilized for sanitary

landfills are limited, and both industry and local government have expressed concern over the scarcity of suitable new sites.

"One measure of the problem is the increasing volume of waste which requires disposal each year. While the rate of waste generation within New Jersey is rising steadily, the volume of waste imported from other states is increasing at an alarming rate. The depletion or abandonment of solid waste facilities in our neighboring states has greatly affected the tonnage of solid waste which is brought into New Jersey for disposal." (App. 149-160).

The extent of the environmental harm and the danger to public health from landfills has been further discussed in a series of affidavits submitted by administrators of the Solid Waste Administration of the New Jersey Department of Environmental Protection. Bernhardt Lind, then Chief of the Bureau of Solid Waste Management, explained:

"At the present time, the only viable method of solid waste disposal that exists in New Jersey is through sanitary landfills. Thus, sanitary landfills are necessary. However, even though they are necessary, they are, at best a necessary evil. Sanitary landfills are a vast improvement over former open and often burning dumps and polluting incinerators. But sanitary landfills have environmental problems all their own. In New Jersey, virtually all sanitary landfills can be expected to produce leachate, a noxious and highly polluted liquid which is seldom visible and frequently pollutes our ground and surface waters. The natural decomposition process which occurs in sanitary landfills generates a mixture of gases including methane, the same 'natural' gas used in cooking and heating. It was once believed that solid waste could be used to make swamps into good, usable lands. Examination of terminated landfills reveal that their use for building purposes is not desirable due to the high cost of required pilings and gas accumulation prevention measures. The environmental insults resulting from sanitary landfills demand that the number, size and height of landfills be held to a minimum until such time as viable alternative methods are developed and implemented." (App. 255-256).

Mr. Lind in his affidavit of March 15, 1977 cogently described how waste originating out of state has magnified the scope of these health and environmental problems. After noting that the percentage of the solid waste disposal in New Jersey originating out of state had grown to 20%, Lind concluded:

"The figures above can only be viewed with extreme alarm. For as predicted in previous affidavi's in this matter, expansions of old landfills (both legal and allegedly illegal) have occurred at the expense of scarce rural New Jersey acreage and at at the expense of an increasingly precious rural environment, because the New Jersey landfills simply cannot keep pace with the increasing disposal volume burdening New Jersey while also conforming to public health and safety regulations. For instance, during 1976, plaintiff Fazzio Landfill was closed and during 1977, plaintiff Mac Sanitary Landfill was closed because of environmental (including odor problems) and aesthetic considerations; on the other hand, the loss of volume from these closures

was picked up by other landfills like Kinsley Landfill and Florence Landfill.

• • •

"Further problems exist as a result of the need to open up and expand existing facilities beyond their design capacity. For example, due to the closing of Mac Landfill and Fazzio Landfill, a significantly increased volume of waste is being dumped at Big Hill Landfill. The subsurface geology of this landfill consists primarily of highly permeable sands which could allow dripping and dangerous leachate (a noxious and highly polluted liquid often caused by landfills) as well as methane gases to percolate and flow through the earth's strata and into the important groundwater of the State. Furthermore, expanding existing landfills could lead to increased health hazards caused by rodents, fires and scavenger birds; landfills also, needless to say, do not help New Jersey's aesthetic appearance nor New Jersey's noise or water or air pollution problems. In fact, citizen complaints regarding noise and odors have been received by DEP regarding Big Hill Landfill and there are also indications that said landfill may be causing water pollution problems in the underlying Cohansey and Kirkwood aquifers. Thus, it can be concluded that the above potential environmental insults demand that New Jersey not perpetuate 'bad' landfills and that the number of landfills be held to a minimum." (Motion for Clarification, etc., at 62sa-65sa).*

* This affidavit, which was inadvertently omitted from the appendix, will be included in a supplemental appendix to be filed by appellants.

On the basis of the cross motions for summary judgment, the trial court concluded that waste is a proper subject of interstate commerce, that chapter 363 discriminates against such commerce and that the statute therefore violates the Commerce Clause (App. 6-13).

On appeal by the State, the Supreme Court of New Jersey found that the objective of chapter 363 was ". . . to prolong the useful lifespan of landfill areas within the state . . ." and thereby serve ". . . the needs of public health as well as endeavoring to preserve the environment." (App. 54). It further found that the legislation did not discriminate against interstate commerce, observing that ". . . the purpose of the legislation is to protect the inhabitants and vital resources of New Jersey, not to impose economic barriers or create commercial restrictions." (App. 55). The court therefore concluded that the Commerce Clause had not been violated: "[W]here the effect upon trade and commerce is relatively slight, as is here the case, and where at the same time the values sought to be protected by the state legislation are as crucial to the welfare of its citizens as is here true, we have no hesitancy in sustaining the state action (App. 58).

On January 9, 1976, appellants filed an appeal with the Court (App. 303) and on April 5, 1976, probable jurisdiction was noted. 425 U.S. 910 (1976).

At the oral argument on November 3, 1976, the Assistant Attorney General appearing for the State of New Jersey noted in response to a question from Mr. Justice White that twelve days previously the President had signed into law the Resource Conservation and Recovery Act of 1976, which would expand the federal role in dealing with solid waste problems. On February 23, 1977, the Court, with four justices dissenting, issued a per curiam

opinion vacating the judgment of the Supreme Court of New Jersey and remanding the case for reconsideration in light of the Resource Conservation and Recovery Act of 1976. *Philadelphia* v. *New Jersey,* 430 U.S. 141 (1977) (App. 59-61).

On the remand, the Supreme Court of New Jersey, by opinion dated June 20, 1977, held that chapter 363 is fully consistent with the Resource Conservation and Recovery Act and again unanimously upheld its validity. *City of Philadelphia* v. *State Dept. of Environ. Protec.,* 73 N. J. 562, 376 A. 2d 888 (1977) (App. 62-74).

Summary of Argument

In New Jersey and elsewhere the government, in discharge of its responsibility to provide for the health, safety and welfare of its people, makes provision for the disposal of waste, either by performing this service itself or by regulating private parties. However, the State and its people pay a social cost for this public service. At the present time the primary means of waste disposal in New Jersey is through landfills. As expressly found by the Supreme Court of New Jersey, landfills present numerous dangers to public health and the environment. Virtually all landfills can be expected to produce leachate, a noxious and highly polluted liquid which contaminates our ground and surface waters. Landfills also generate a mixture of gases which may cause fires and which greatly limit the potential future uses of the land. This means that while landfills are necessary for the disposal of waste generated in New Jersey, they are at best a necessary evil.

Congress, by the enactment of the Resource Conservation and Recovery Act of 1976, has expressly recognized

that waste disposal practices vitally affect public health and the environment and that they should therefore be the subject of comprehensive planning and regulation by government. The Act also recognizes that the problems of solid waste disposal are primarily of local, not national, concern, and that the states have broad discretion in determining the elements of their individual solid waste management planning. Therefore, the legislation does not preclude a state from restricting the use of its landfill space to the disposal of waste generated within the state.

Nor does the Commerce Clause by its own force compel a state which allows land to be used for the disposal of waste generated within its boundaries also to allow land to be used for waste generated in other states. The restriction on the use of New Jersey landfills to wastes generated in the State does not implicate any substantial national interest in the maintenance of an open economy which the Commerce Clause was designed to protect. Rather, it represents a proper exercise of the basic power of the State to protect its environment and the health of its inhabitants by reducing the overall volume of waste disposed on land within the state. This conclusion is reinforced by the provisions of the Resource Conservation and Recovery Act which recognize that solid waste disposal should be conducted in accordance with comprehensive government regulation and that it is primarily a subject of local rather than a national concern. Therefore, the Court should affirm the conclusion of the Supreme Court of New Jersey that a state may prohibit the use of its land as a disposal site for waste generated within a political subdivision of another state.

ARGUMENT

POINT I

Since the Federal Resource Conservation and Recovery Act of 1976 expressly recognizes that the disposal of waste on the land may present a danger to public health and the environment and that the states have primary responsibility for planning and management to reduce this danger, the Act permits a state to restrict the use of landfills within its boundaries to the disposal of waste generated in the state.

It is now well established that an intent to pre-empt state legislation should not be inferred unless there is "an unambiguous congressional mandate to that effect." *Florida Lime & Avocado Growers* v. *Paul,* 373 U.S. 132, 147 (1963). The Court has been particularly reluctant to find an intent to pre-empt state legislation which has been enacted to serve environmental interests (*Askew* v. *American Waterways Operators, Inc.,* 411 U.S. 325 (1973); *Huron Cement Co.* v. *Detroit,* 362 U.S. 440 (1960)) or to protect public health. *Mintz* v. *Baldwin,* 289 U.S. 346 (1933); *Reid* v. *Colorado,* 187 U.S. 137, 147-149 (1902). Therefore, the appellants must bear the heavy burden of demonstrating an unambiguous congressional mandate that the Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 42 U.S.C. §6901, *et seq.,* (hereinafter "the Act") pre-empts the New Jersey legislation restricting the use of landfills located within its boundaries to the disposal of waste generated in New Jersey.

The appellants have failed to satisfy that burden, because they have not shown that the Act on its face in any way undermines the validity of the New Jersey legislation. On the contrary, the Act constitutes an express

congressional recognition that the problems of solid waste disposal are primarily of state and local, not national concern. Thus, section 1002(a)(4) (42 U.S.C. §6901(a)(4)) states that ". . . the collection and disposal of solid wastes should continue to be primarily the function of State, regional and local agencies. . . ." This point is underscored by the comments during deliberations on the bill on the floor of the Senate. The co-sponsor of the bill, Senator Randolph, stated:

> "In developing this legislation, the members of the Committee on Public Works recognized that solid waste is a uniquely local problem and that programs in this area should be developed and managed at the local government level.
>
> "This is not an area which lends itself to extensive planning and operation from the Federal level. The role of the Federal Government in solid waste activities should be one primarily of providing financial and technical assistance. Guidelines authorized by this legislation are to be descriptive of the options available to local and regional bodies responsible for solid waste management. These guidelines should not be taken as directives from the Federal Government for a position by the local authorities.
>
> "Guidelines should provide the States and area planning agencies with maximum flexibility, while assuring that such agencies or organizations have adequate information to effectively implement the planning provisions.
>
> "To assure that the Federal Government adopts a proper place in this program, I emphasize the Administrator of the Environmental Protection

> Agency is required to notify the Congress before the publication of guidelines, information or model codes, ordinances or statutes. The agency is restricted under the provisions of the bill from advocating specific policy alternatives at the State or local level. These matters are best left—and I emphasize this—to local choice since they involve substantial regional variations. It is not appropriate for the Environmental Protection Agency to become involved other than in the provision of technical assistance on request." 122 Cong. Rec. 11069 (1976) (remarks of Senator Randolph).

These views were echoed by Senator Stafford of Vermont (*Id.* at 11071), Senator Baker of Tennessee (*Id.* at 11072) and Senator Dole of Kansas (*Id.* at 11094-11095). No contrary view was expressed. See also S. Rep. No. 94-988, 94th Cong., 2nd Sess. 11 (1976).

A review of the individual subsections of the Act also shows that its overall design was to foster the waste disposal programs of the state rather than to pre-empt the field at the federal level. The Act represents a significant new federal commitment to participate in solving the problems of solid waste collection and disposal. However, with limited exceptions discussed below, the Act does not purport to override state legislation dealing with the problems of solid waste management. The Act provides at section 2003 (42 U.S.C. §6913) for the establishment by the Administrator of the Environmental Protection Agency of "Resource Conservation and Recovery Panels", consisting of technical, marketing, financial and institutional specialists, which will have the responsibility of providing "States and local governments upon request with technical assistance on solid waste management, resource recovery and resource conservation." Section 2004

(42 U.S.C. §6914) establishes a program of federal grants to assist private and public purchasers of tire shredders. Section 7007 (42 U.S.C. §6977) authorizes federal grants to train State and local personnel to carry out solid waste and resource recovery programs. Federal funding of research and development and demonstration projects are authorized by section 8001 (42 U.S.C. §6981) and section 8004 (42 U.S.C. §6984). The sections are all elements of an overall congressional design to leave the responsibility for dealing with the problem of solid waste disposal at the state and local level but at the same time to provide federal financial and technical assistance.

The one area in which the Act imposes a direct regulatory responsibility upon the federal government is hazardous waste. The Administrator has the responsibility under section 3001 (42 U.S.C. §6921) for identifying the characteristics of hazardous waste and for listing particular hazardous wastes not later than eighteen months after enactment of the Act. The Administrator is required within the same period to promulgate regulations governing the generation, storage, transportation and disposal of hazardous waste. Section 3002-3005 (42 U.S.C. §6922-6925). The Administrator also may delegate the responsibility for regulation of hazardous wastes to state authorities. Section 3006 (42 U.S.C. §6926).

Although the exact parameters of the eventual federal regulation of hazardous waste are difficult to predict at this time, it is clear that the assumption of federal regulatory control over the subject has no immediate impact upon New Jersey's prohibition against the disposal of waste originating out-of-state. First, these sections of the Act are not self-implementing but rather are dependent upon the promulgation by the Administrator of the Environmental Protection Agency of a list of hazard-

ous wastes and of regulations governing their generation, storage, transportation and disposal. Since the Administrator has eighteen months from enactment of the Act within which to promulgate such lists and regulations (and it is anticipated this timetable will be extended), the federal regulation of this area probably will not become operative for at least another six months. It is firmly established that such potential future regulation of a subject matter by a federal agency does not pre-empt present regulation by the states. *Colorado Anti-Discrimination Commission* v. *Continental Air Lines*, 372 U.S. 714, 723-724 (1963); *H. P. Welch Co.* v. *New Hampshire*, 306 U.S. 79, 84-85 (1939).

Secondly, and even more importantly, when the federal regulatory program does become operative, it will be limited to "hazardous wastes". This term is generally understood in the field of solid waste management to apply solely to industrial wastes which are inherently dangerous to plant and animal life. The Senate Committee on Public Works noted in its report on the Act that "[m]aterials of major concern are arsenic wastes, insecticide and pesticide residues, waste oil, explosive wastes, sludge contaminated with metals such as chromium and zinc, and radioactive wastes." S. Rep. No. 94-988, 94th Cong., 2nd Sess. 3 (1976). In the Act, "hazardous waste" is defined as:

> ". . . a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may—
>
> "(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

> "(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." Section 1004(5) (42 U.S.C. §6903(5)).

Furthermore, the Administrator is directed, in listing the "hazardous wastes" which will be subject to federal regulation, to take into account ". . . toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics." Section 3001 (42 U.S.C. §6921). It seems clear that ordinary household and commercial waste, or garbage, would not fall within these criteria for defining "hazardous waste" and thus would not be subject to federal regulation under sections 3001-3011 (42 U.S.C. §6921-§6931) of the Act. This conclusion is supported by the Report of the Senate Committee on Public Works on the Act which expressly states that the permit system for hazardous wastes ". . . is not to be used to control the disposal of hazardous substances used in households or to extend control over general municipal wastes based on the presence of such substances." S. Rep. No. 94-988, 94th Cong., 2nd Sess. 16 (1976). Since the New Jersey statute, as limited by its implementing regulations, is primarily directed towards general municipal waste, and since the appellants apparently are engaged solely in the disposal of such waste, the federal regulation of "hazardous waste" would have no effect on the subject matter of the instant appeal.

In addition to providing for direct federal regulation of "hazardous waste", the Act establishes a system of incentives for regional planning with respect to the reclamation or disposal of other solid wastes. The Act contemplates joint federal-state action to identify regions

appropriate for solid waste planning and to adopt regulations for solid waste management. Section 4002(a) (42 U.S.C. §6942(a)) provides that within 180 days after enactment of the Act, the Administrator ". . . after consultation with appropriate Federal, State, and local authorities, shall by regulation publish guidelines for the identification of those areas which have common solid waste problems and are appropriate units for planning regional solid waste management services." Section 4006(a) (42 U.S.C. §6946(a)) provides that within 180 days after adoption of the federal guidelines, ". . . the Governor of each State, after consultation with local elected officials, shall promulgate regulations based on such guidelines identifying the boundaries of each area within the State which, as a result of urban concentrations, geographic conditions, markets, and other factors, is appropriate for carrying out regional solid waste management." Section 4006(c) (42 U.S.C. §6946(c)) also provides that such regions may embrace more than one state, in which event ". . . the Governors of the respective states . . . shall enter into agreements identifying the boundaries of such region." Section 4006(b) (42 U.S.C. §6946(b)) provides that within a third 180 day period the State shall ". . . (A) identify an agency to develop the State plan and identify one or more agencies to implement such plan and (B) identify which solid waste functions will, under such State plan, be planned for and carried out by the State and which such functions will, under such State plan, be planned for and carried out by regional or local authority or a combination of regional or local and State authorities." Section 4002(b) (42 U.S.C. §6942(b)) provides that eighteen months after enactment of the Act ". . . the Administrator shall, after consultation with appropriate Federal, State, and local authorities, promulgate regulations containing guidelines to assist in the development

and implementation of State solid waste management plans." The Act also authorizes appropriations for solid waste planning for states with a state plan that has been approved by the Administrator. Section 4007(b) (42 U.S.C. §6947(b)).

There is no incompatibility between these provisions and the restriction of the use of landfills located within New Jersey to the disposal of waste originating in the State. The only way chapter 363 could conflict with the Act would be if the plans of New Jersey and its neighboring states included "interstate regions" pursuant to section 4006(c) (42 U.S.C. §6946(c)). However, the "Interim Guidelines" for "Identification of Regions and Agencies for Solid Waste Disposal" adopted by the Administrator on May 16, 1977 (42 Fed. Reg. 24926, 40 C.F.R. §253) do not purport to mandate the establishment of an "interstate region" in any particular area and the Governor of New Jersey, pursuant to section 4006(c), has designated solely intrastate regions. See N.J. Pub. L. 1975, c. 326 (N.J.S.A. 13:1E-1 *et seq.*). There is thus no conflict between the Act, at least as presently administered, and the restriction by New Jersey of the use of its landfills to waste originating in New Jersey. Therefore, as in *Askew* v. *American Waterways Operators, Inc.*, supra, at 336 ". . . it will be time to resolve any such conflict between federal and state regimes when it arises."

Furthermore, the planning provisions of the Act are clearly intended to be voluntary. The first section of the planning subchapter states that its "objectives . . . are to assist in developing and encouraging methods for the disposal of solid waste which are environmentally sound and which maximize the utilization of valuable resources and to encourage resource conservation . . . through Federal technical and financial assistance . . . designed to foster cooperation among Federal, State, and local gov-

ernment and private industry." Section 4001 (42 U.S.C. §6941). This language clearly contemplates voluntary undertakings, rather than mandatory obligations. The voluntary nature of the planning provisions of the Act is also evident in the specific section dealing with "interstate" regions, which states that the establishment of these regions shall be by "agreement of the respective governors. Furthermore, there is no provision for the Administrator imposing an interstate plan in the event the governors fail to agree.[1]

The intent of Congress to make interstate regional planning voluntary is confirmed by the numerous statements in the legislative history that ". . . States and areawide solid waste management planning agencies have free choice in selecting the elements of their solid waste management plans." S. Rep. No. 94-988, 94th Cong., 2nd Sess. 11 (1976). See also 122 Cong. Rec. 11069 (1976) (comments of Senator Randolph); *Id.* at 11071 (comments of Senator Stafford); *Id.* at 11072 (comments of Senator Baker); *Id.* at 11094-11095 (comments of Senator Dole).[2]

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[1] The essentially voluntary planning provisions of the Resource Conservation and Recovery Act are dramatically different from the mandatory planning provisions of the Clean Air Act, as amended in 1970. Pub. L. 91-604, 42 U.S.C. §1857-1858a. See *The Clean Air Amendments of 1970: Can Congress Compel State Cooperation in Achieving National Environmental Standards?* 11 Harv. Civil Rights-Civil Liberties L. Rev. 701 (1976). If it were possible to read the planning provisions of the Resource Conservation and Recovery Act as mandatory, a substantial question would be presented as to whether Congress has the authority to impose mandatory planning obligations upon the states in the environmental area. *Cf. EPA* v. *Brown,* 431 U.S. 99 (1977); *National League of Cities* v. *Usery,* 426 U.S. 833 (1976).

[2] One exception to the general design of local option with respect to state plans is the requirement that open dumps be eliminated. See section 4005 (42 U.S.C. §6945).

This point is stated with particular clarity in the Report of the House Commerce Committee:

> "It is the Committee's intention that federal assistance should be an incentive for state and local authorities to act to solve the discarded materials problem. At this time federal preemption of this problem is undesirable, inefficient, and damaging to local initiative.
>
> "Simply, the discarded materials problem is one of planning and the Committee anticipates that federal guidelines for planning will foster the necessary cooperation between the federal government, states, and local regions, to meet very broad and flexible objectives of this act. If those objectives are not met, the states and local authorities within the states will lose the federal or technical assistance. However, the provisions of this legislation, specifically do not authorize the federal government to take over the responsibility for discarded materials disposal planning." H. Rep. No. 94-1491, at 33.

Therefore, even if the guidelines promulgated by the Administrator under section 4002(a) (42 U.S.C. §6942(a)) were at some later date to suggest the appropriateness of an interstate region encompassing New Jersey, the Governor of New Jersey still will have the option whether to agree to such a plan.

In any event, assuming arguendo that the Act could be read to impose mandatory obligations upon the respective states to participate in interstate planning, chapter 362 would not stand as an obstacle to compliance with that obligation. *Cf. Jones* v. *Rath Packing Co.,* 430 U.S. 519 (1977). Chapter 363 does not by its terms preclude the

Governor of New Jersey from conferring with the governor of a sister state regarding regional solid waste planning. And if the procedures of the Act eventually were to result in an agreement between the governors which was inconsistent with a total ban on the disposal in New Jersey of out-of-state waste, this could be easily implemented, as found by the Supreme Court of New Jersey (App. 72-73), through a further exercise by the Commissioner of Environmental Protection of his power to adopt exceptions from the total ban where that can be done ". . . without endangering the public health, safety and welfare. . . ." N.J.S.A. 13:11-10. Furthermore, an authorization resulting from bilateral discussions between the responsible officials of the two states to dispose of waste originating out-of-state in New Jersey would be significantly different from Philadelphia's unilateral decision to use New Jersey as its disposal site. Such authorization undoubtedly would be the product of a careful and coordinated evaluation of the disposal needs and the environmental and health concerns of the two states rather than the unplanned result of certain New Jersey entrepreneurs seeking to maximize profits without regard to the health and environmental concerns of the rest of the citizenry.

Finally, it should be noted that the Solicitor General, on behalf of the United States as *amicus curiae,* has taken a firm position that the Act does not pre-empt chapter 363. In his memorandum on the application for stay pending appeal, the Solicitor General stated:

> "We think that the Act's full purposes may be achieved whether or not New Jersey accepts waste from other States, at least in the absence of any experience or regulations establishing the presence of a hindrance.
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> • • •

> "[T]he explicit provision for partial preemption in section 3009 strongly suggests that no further preemption is intended.
>
> • • •
>
> "The fact that Subchapter IV is no more than a method of providing federal assistance to cooperating States indicates that Congress did not intend to bring coercive pressure to bear upon the State or to oust any of their laws."[3]

If there were any doubt concerning the intent of Congress to permit the states to implement regulatory provisions such as chapter 363, the position of the United States Government, as expressed through the Solicitor General, should tip the balance in favor of finding that chapter 363 is fully consistent with the legislative scheme envisioned by Congress. *Cf. EPA* v. *Brown,* 431 U.S. 99, 103 (1977); *Alfred Dunhill of London, Inc.* v. *Cuba,* 425 U.S. 682, 696-697 (1976); *New York State Dept. of Social Services* v. *Dublino,* 413 U.S. 405, 420-421 (1973); *Investment Company Institute* v. *Camp,* 401 U.S. 617 (1971).

Therefore, the enactment of the Resource Conservation and Recovery Act of 1976 does not in any way undercut the validity of the New Jersey legislation prohibiting the disposal of waste originating out of state. Rather, it reflects congressional concurrence with the view that the disposal of waste does not involve the national interest in maintenance of an open economy, but instead the discharge

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[3] Obviously, the brief filed by the Solicitor General represents the authoritative statement of the United States Government as to the compatibility of chapter 363 with federal legislation. Therefore the contrary statement four years ago by a middle echelon official of EPA, set forth at pp. 133-136 of the appendix and heavily relied upon in appellants' brief, should be disregarded.

by government under the police power of a fundamental responsibility to provide for the disposal of waste generated by its inhabitants with the least possible adverse impact upon health, the environment and land use.

POINT II

The requirement that the use of landfills within a state be restricted to the disposal of waste generated in that state falls within the basic power of the state to protect its environment and the health of its inhabitants and thus does not violate the Commerce Clause of the United States Constitution.

It has been well established at least since *Cooley* v. *Board of Wardens,* 12 How. 299 (1851) that the Commerce Clause not only provides an affirmative grant of authority to Congress, but also ". . . even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman* v. *Hewit,* 329 U.S. 249, 252 (1946). It is equally well established, however, ". . . that under our constitutional scheme the States retain 'broad power' to legislate protection for the citizens in matters of local concern such as public health, . . ." *Great A.&P. Tea Co.* v. *Cottrell,* 424 U.S. 366, 371 (1976). As the Court noted in *H. P. Hood & Sons* v. *DuMond,* 336 U.S. 525, 533 (1949), "[the] distinction between the power of the State to shelter its people from menaces to their health and safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law." The local concerns over which the states retain comprehensive authority, even when interstate commerce may be affected, include protection of the environment. *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440 (1960); *cf. Berman* v. *Parker,* 348 U.S. 26 (1954).

The Court frequently has been confronted with challenges to state legislation which furthered legitimate local interests but simultaneously imposed a significant burden upon interstate commerce. In such cases, ". . . the Court in absence of congressional guidance is called upon to make 'delicate adjustment of the conflicting state and federal claims,' . . . thereby attempting 'the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce.'" *Great A. & P. Tea Co.* v. *Cottrell, supra,* at 928. The leading cases in this area well illustrate how delicate this process of accommodation has been. Thus, in *Bibb* v. *Navajo Freight Lines,* 359 U.S. 520 (1959), the Court found the Commerce Clause to be violated by a statute requiring a particular type of rear fender mudguard on trucks and trailers operated within a state, but in *South Carolina State Highway Dep't* v. *Barnwell Bros.,* 303 U.S. 177 (1938) it sustained state limitations on the weight and width of trucks and trailers. In *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761 (1945), the Court held state statutes imposing limitations on the length of freight cars to be violative of the Commerce Clause, but it has consistently sustained state full crew laws. See *e.g. Brotherhood of Loc. F & E* v. *Chicago, R.I. & P.R.R. Co.,* 393 U.S. 129 (1968). And in *Dean Milk Co.* v. *Madison,* 340 U.S. 349 (1951), the Court held the Commerce Clause to be violated by an ordinance which prohibited the sale of milk in a municipality unless it had been pasteurized and bottled at an approved plant located within five miles of the municipality, but in *Milk Control Board* v. *Eisenberg Farms Products,* 306 U.S. 346 (1939), it sustained a statute requiring interstate milk dealers to keep records, to

post a bond to guarantee prompt payment to purchasers and to pay minimum prices to producers. Although the results varied, the Court was confronted in all these cases not only with a legitimate local interest but also an indisputable burden upon the open national market which the Commerce Clause was designed to protect. Therefore, it carefully scrutinized any burdens on the free flow of interstate commerce with the consequence that any discrimination against interstate transactions almost invariably resulted in a declaration of invalidity.

There have been other cases, however, in which no substantial interests in national commerce were implicated and local concerns were paramount. The Court has sustained state legislation under such circumstances without engaging in the delicate process of balancing required when ". . . regulation of local matters may also operate as a regulation of commerce . . . ." *Southern Pacific Co.* v. *Arizona, supra,* at 768. *Cf. Wilson* v. *The Blackbird Creek Marsh Co.,* 2 Pet. 245 (1829). Local interests are most clearly paramount in preventing the transportation into a state of articles which are inherently injurious to public health, safety and welfare. As the Court stated in *Sligh* v. *Kirkwood,* 237 U.S. 52, 60 (1915):

> "The power of the state to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well-established. Such articles, it has been declared by this Court, are not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution. 'Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate

> sources and causes of destruction to human health and life. The self-protecting power of each state, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution.
>
> "'Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the state . . . .'" 237 U.S. at 60 (citations omitted).

To the same effect, the Court said in *Pike* v. *Bruce Church,* 397 U.S. 137, 143-144 (1970):

> "[T]o the extent the Act forbids the shipment of contaminated or unfit produce, it clearly rests on sure footing. For, as the Court has said, such produce is 'not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution.'"

This principle was applied in *Clason* v. *State of Indiana,* 306 U.S. 439, 442-443 (1939), where the Court upheld an Indiana statute which in effect prohibited the interstate transportation of animal carcasses not slaughtered for food. The Court, relying on *Sligh,* recognized that the statute was "a sanitary and health measure not intended to cause discrimination against or to burden interstate commerce. . . ." 306 U.S. at 443. The Court emphatically stated:

> "Here, contrary to what seems to be the insistence of counsel, the State has not recognized dead horses as legitimate articles of intrastate commerce. It permits them to be sold only to licensed operators

who must transport them immediately under strict sanitary regulations for prompt delivery to a licensed plant there to be rendered innocuous without delay by prescribed methods. All this is part of a workable scheme to secure prompt removal of decaying carcasses and thus protect against obvious evils.

"We can find no substantial basis for the charge of discrimination against legitimate interstate commerce. That any real burden upon commerce which the State is not free to inhibit will result from the challenged statute seems impossible.

"There is no suggestion of conflict with a federal enactment. The mere power of the Federal Government to regulate interstate commerce does not disable the State from adopting reasonable measures designed to secure the health and comfort of their people. The statute under consideration is an effort to discharge an obligation to the public; the means adopted we think are clearly appropriate to this lawful end." *Id.* at 443-444.

See also *Price* v. *Illinois,* 238 U.S. 446 (1915); *The Minnesota Rate Cases,* 230 U.S. 352, 406-408 (1913); *Asbell* v. *Kansas,* 209 U.S. 251 (1908); *Rasmussen* v. *Idaho,* 181 U.S. 198 (1901).

It is clear that the prohibition against the disposal within New Jersey of waste originating out of state falls within the basic power of the State to protect its environment and the health of its inhabitants and thus does not violate the Commerce Clause. It does not matter whether it is found that waste intended for disposal is not a legitimate item of commerce (*Clason* v. *Indiana, supra*) or that environmental and health concerns of the

State are paramount to the commercial interests of the appellants. *Cf. Robertson* v. *California,* 328 U.S. 440, 458-459 (1945). The conclusion is the same. As stated by the Supreme Court of New Jersey, ". . . where the effect upon trade and commerce is relatively slight, . . ." and ". . . where at the same time the values sought to be protected by the state legislation are . . . crucial to the welfare of its citizens . . .", there should be ". . . no hesitancy in sustainnig the state action." (App. 58).

The transportation and disposal of waste is vastly different from the commerce in which the Founding Fathers sought to maintain an open national market. The appellants' business does not involve the sale of a product or resource, such as milk, *H.P. Hood & Sons, Inc.* v. *DuMond, supra,* natural gas, *Pennsylvania* v. *West Virginia, supra; West Kansas Natural Gas Co., supra,* or livestock, *Brimmer* v. *Rebman,* 138 U.S. 78 (1891); *Railroad Co.* v. *Husen,* 95 U.S. 465 (1877). Nor does it involve an instrumentality of national commerce, such as railroads, *Brotherhood of Loc. F & E* v. *Chicago, R.I. & P.R.R. Co., supra,* or highways, *Bibb* v. *Navajo Freight Lines, supra.* Rather, their business involves the fundamental responsibility of government, under the police power, to provide for the disposal of waste generated by its inhabitants. *Clason* v. *Indiana, supra; Cf. Nat'l League of Cities* v. *Usery,* 426 U.S. 833 (1976).

Furthermore, the sole purpose and effect of the statute is not economic protectionism but rather to further the health and environmental interests of the State. No New Jersey commercial interests stand to gain advantage over competitors from outside the state as a result of the ban on dumping out-of-state waste. On the contrary, among the appellants are New Jersey landfill operators. The complaint is not that New Jersey has forged an economic preference for its own commercial interests, but rather

that it has denied a small group of its entrepreneurs an economic opportunity to traffic in waste in order to protect the health, safety and welfare of the citizenry at large. *Clason* v. *Indiana, supra.* The ban on dumping out-of-state waste therefore does not implicate any substantial national interest in the maintenance of an open economy which the Commerce Clause was designed to protect.

On the other hand, the ban does serve a vital local interest in the preservation of the state's environment and the health of its inhabitants. There is a solid waste crisis in New Jersey. The nature of the crisis was stated in emphatic terms by the New Jersey Legislature and the Supreme Court of New Jersey. Section 1 of chapter 363 declares:

> "The Legislature finds and determines that since the enactment of P.L. 1973, c. 39 (C. 13:11-1, et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate landfill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited."

Similarly, the Supreme Court of New Jersey, referring to its own findings in prior litigation involving solid waste problems as well as taking judicial notice of legislative studies, stated:

"The Court is acutely aware of the solid waste disposal problem which now exists in the State of New Jersey. Very recently we recognized that it had reached 'crisis proportions' due to the increasing scarcity of sites for dumping and landfill. *Southern Ocean Landfill, Inc.* v. *Mayor and Council of the Township of Ocean,* 64 N.J. 190, 193, 314 A. 2d 65 (1974).

• • •

"Compounding the shortage problem are other extremely important environmental considerations. Many existing landfills within the State are located within ecologically sensitive areas, such as floodplains, wetlands, or on State-owned public trust tidelands. The operation of landfills now located in these areas may have to be limited or discontinued. An example of this is the action taken by HMDC in preserving some 1,500 acres of virgin wetlands which had formerly been tentatively designated for use as landfill sites. Further actions of a similar nature are contemplated, thus reducing the estimates of the potential lifespans of such existing facilities.

• • •

"Our Appellate Division has recognized that garbage and refuse may provide a direct threat to the public health. *Shaw* v. *Byram Township,* 86 N.J. Super. 598, 602, 207 A. 2d 570 (App. Div.), certif. denied, 45 N.J. 35, 210 A. 2d 780 (1965) and indeed the point is self-evident. Likewise, the detrimental effects which sanitary landfills have upon the environment have been acknowledged:

> "• • • Sanitary landfills conducted on virgin land forever ruin the possibility of preserving the site for conservation. Additionally, such landfill op-

erations can have an adverse effect on the ecological balance of the surrounding area. A sanitary landfill operation also has *severe limiting effects on future development of the property.* Problems of settlement, gas generation, and fires make it difficult to construct structures on former landfill sites. [*Municipal Sanitary Landfill Authority* v. *Hackensack Meadowlands Development Commission,* 120 N.J. Super. 118, 122 (App. Div. 1972); emphasis in original]'

"We recognize, and now emphasize, that the objectives of the statutes and regulations in question are not only to preserve the health of New Jersey residents by keeping their exposure to solid waste and landfill areas to a minimum, but also to preserve for the benefit of both present and future generations the natural habitat and ecological values which landfill usage would destroy." (App. 38, 40, 51-52).

These legislative and judicial findings are solidly grounded on the Basis and Background Statement of the New Jersey Department of Environmental Protection, quoted in the Counterstatement of the Case, and the report of the State of New Jersey County and Municipal Government Commission, entitled *Solid Waste: A Coordinated Approach* (1972), of which judicial notice was taken by the Supreme Court of New Jersey (App. 40). Since there is a reasonable basis in the record for the findings of the New Jersey Legislature and the Supreme Court of New Jersey, they should be accepted on appeal by the Court. *Evco* v. *Jones,* 409 U.S. 91, 94 (1972); *Local Union No. 10* v. *Graham,* 345 U.S. 192, 197 (1952); *Welch* v. *Swasey,* 214 U.S. 91 (1909). As the Court noted in *Evco* v. *Jones, supra,* the factual findings of a state

supreme court will be re-examined only in "exceptional circumstances." No showing of such "exceptional circumstances" has been made in this case.

On the contrary, the general literature on the subject, of which the Court can and should take judicial notice (*Parker* v. *Brown,* 317 U.S. 341, 363 (1943); *Sligh* v. *Kirkwood, supra,* at 61; see also Davis, *A System of Judicial Notice Based on Fairness and Convenience,* Perspectives of Law 69 (1964)), fully corroborates the findings of the Supreme Court of New Jersey concerning the danger to the environment and public health from landfills.[4] It has been widely recognized that landfills are unsightly, a source of noxious odors and vermin and, with

[4] *Gas and Leachate from Landfills: Formation, Collection and Treatment,* Proceedings of a Research Symposium held at Rutgers University, U. S. Environmental Protection Agency, March 1976 (hereinafter *Gas and Leachate*); Esmaile, Houshang, "Control of Gas Flow from Sanitary Landfills," *Journal of the Environmental Engineering Division,* Proceedings of the American Society of Civil Engineers, Vol. 101, EE4, August 1975 "hereinafter *Control of Gas Flow*"; *Hazardous Waste Disposal Damage Reports,* U.S. Environmental Protection Agency, Office of Solid Waste Management Programs, June 1975; Schmalensee, Richard, Ramachandra Ramarathan, Wolfhard Ramm and Dennis Smallwood, *Measuring External Effects of Solid Waste Management,* U. S. Environmental Protection Agency, March 1975 (hereinafter *Measuring External Effects*); Blannan, Janet and Mirdza Peterson, "Survival of Fecal Coliforms and Fecal Streptococci in a Sanitary Landfill," *News of Environmental Research in Cincinnati,* U. S. Environmental Protection Agency, April 12, 1974 "hereinafter *Survival of Fecal Coliforms*"; Miller, David, Frank DeLuca and Thomas Tessier, *Ground Water Contamination in the Northeast States,* U. S. Environmental Protection Agency, June 1974 (hereinafter *Ground Water Contamination*).

the introduction of heavy machinery, exceedingly noisy.[5] It is also now known that landfills are almost certain sources of ground and surface water pollution,[6] that they produce dangerous gases as a byproduct of both aerobic

[5] "Noise at sanitary landfill sites is generated by the unloading of refuse, including the operation of compactor and transport trucks as they disgorge their cargoes and the constant operation of the heavy equipment used for spreading, compacting, and covering the refuse." *Measuring External Effects, supra* at 219.

Since powerful machinery is required for spreading and compacting in order to reduce vermin, odors and later land settling, noise is a major problem, especially for landfills located in residential areas.

[6] In *Ground Water Contamination, supra,* an evaluation of water contamination in 11 northeast states including New Jersey, the authors consider that the hundreds of reported cases of such contamination represent only a small fraction of the actual pollution present. They conclude that:

> "The thousands of acres of landfills containing municipal and industrial solid wastes are an almost universal source of ground-water contamination in the region." *Id.* at 1.

Though new landfill developers in New Jersey are attempting to install liners and to treat the leachate collected, "little experience exists with regard to the various methods that might be successful in the handling of this complex fluid." *Id.* at 208. It is felt that state regulations are helpful but that the true characteristics of leachate from the various types of landfills, the ability of soils to reduce the concentration of pollutants and the effects of cover materials at landfill sites are not sufficiently understood. The technology

> ". . . for eliminating the landfill as a continuing source of contamination (has) not been developed, and, because of this, there do not appear to be any clear-cut guidelines or policies that can be followed." *Id.* at 218.

and anaerobic decomposition[7] and that they are severely limited as to potential use when completed.[8] The standards originally set for the operation of sanitary landfills (daily compaction and soil cover) are understood today to be inadequate. Attempts to minimize the "leaching" of organic and inorganic pollutants from landfill sites

[7] All landfills (sanitary or otherwise) produce gases—initially carbon dioxide and later, as the oxygen level decreases, methane. "[T]he greater the quantity, putrescibility, moisture content and temperature of the refuse . . . the higher the rate of gas production within the landfill." *Measuring External Effects, supra* at 326.

Completed landfills are not easily converted into safe building sites although gas vents have been used with limited success for controlled escape and burning.

> "The problems of fire and explosion hazards from landfills occur when methane gas . . . seeps into enclosed areas such as adjacent sewer lines or the foundations of buildings located above the fill. . . . Methane seepage from completed landfills is both inevitable and sufficiently abundant to produce a significant hazard." *Id.* at 238, 239.

The authors discuss a study of gas seepage in a 29 building public housing project constructed on fill. Within 21 months after construction explosive mixtures of methane were found in crawl spaces below two of the buildings in the development. As attempts to seal the foundations proved unsuccessful it became necessary to install automatic ventilation equipment, especially since the methane accumulation had rapidly increased during the sceond and third years of monitoring.

[8] Fill materials slowly decompose causing a gradual shifting and settlement over the extent of a given site. Many factors are involved: the weight and composition of the fill, the weight of cover materials, the amount of rainfall and, if the land is used for construction, the weight of the structure placed there. Since a number of these factors are unpredictable (the diverse nature of fill materials for example) "landfills are a particularly poor foundation material for construction". *Id.* at 259.

through the use of liners are still in the experimental stage.[9] Many have been found faulty. Attempts have been made to vent accumulated gases but the danger of fire and explosion has not been eliminated.[10]

The generally recognized fact that solid waste disposal poses substantial dangers to the environment and public health was also expressly acknowledged by Congress in the Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 42 U.S.C. §6901, *et seq.* Thus, section 1002(b) (42 U.S.C. §6901(b)) states:

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[9] Haxo, Henry E., Assessing Synthetic and Admixed Materials for Lining Landfills," *Gas and Leachate, supra,* 130. In *"Survival of Fecal Coliforms," supra,* the authors conclude that pathogenic microorganisms may be "transmitted into the environment through the leaching process" past an eighteen inch clay soil liner (considered reasonably "safe" by many experts in the field). *Id.* Even where leachate is collected for treatment, inert organic matter and totally dissolved inorganic solids cannot easily be removed. See Pohland, Frederick G., "Landfill Management with Leachate Recycle and Treatment: An Overview," *Gas and Leachate, supra,* 159.

[10] Flower, Franklin, "Case History of Landfill Gas Movement Through Soils," *Gas and Leachate, supra,* 177, and "Control of Gas Flow," *supra* at 555. "Case History" describes the death of peach trees in commercial orchards in Glouchester County, the death of ornamental vegetation and the entry of combustible gases into private homes in Camden County and the destruction of farm crops in Burlington County. The author comments, "Sometimes gas vents prevent the lateral migration (of possibly flammable gas) and sometimes they do not." *Id.* at 188.

Also, in *Hazardous Waste Disposal Damage Reports,* compiled by the U.S. Environmental Protection Agency's Office of Solid Waste Management Programs, *supra,* the agency describes three separate instances of waste disposal practices which resulted in arsenic poisoning, the destruction of farmland and, in New Jersey, the death of a bulldozer operator.

"ENVIRONMENT AND HEALTH.—The Congress finds with respect to the environment and health, that—

"(1) although land is too valuable a national resource to be needlessly polluted by discarded materials, most solid waste is disposed of on land in open dumps and sanitary landfills;

"(2) disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment;

"(3) as a result of the Clean Air Act, the Water Pollution Control Act, and other Federal and State laws respecting public health and the environment, greater amounts of solid waste (in the form of sludge and other pollution treatment residues) have been created. Similarly, inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health;

"(4) open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land;

"(5) hazardous waste presents, in addition to the problems associated with non-hazardous solid waste, special dangers to health and requires a greater degree of regulation than does non-hazardous solid waste; and

"(6) alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable

solid waste disposal sites within five years unless immediate action is taken; . . . ."

Significantly, the appellants do not directly challenge the factual finding of the Supreme Court of New Jersey that landfills pose a serious threat to public health and the environment. Rather they seek to satisfy the burden imposed by *Evco* v. *Jones, supra,* by simply describing the web of federal and state statutes and regulations which address the problems of waste disposal (Appellants' brief, pp. 45-58). However, no responsible authority asserts that these measures are likely in the foreseeable future to eliminate the health and environmental problems of waste disposal, any more than the extensive federal and state efforts in the field of law enforcement are likely to eliminate crime. On the contrary, the voluminous statutory and regulatory provisions cited by appellants, the congressional reports on the bills enacted as the Resource Conservation and Recovery Act of 1976 and the congressional findings set forth in the Act, all attest in dramatic terms to the fact that the country is far away from a point where it accurately can be said, as urged by appellants, that the disposal of waste poses no real health or environmental problems.

The appellants also point to statements that chapter 363 was enacted to preserve available landfill space for the disposal of New Jersey waste and seek to infer that the legislation was not designed to serve health or environmental interests of the State. Initially, it should be noted that appellants have failed to cite any authority for the proposition that the Commerce Clause disables a state from enacting legislation to limit an activity which has a deleterious impact on land use. *Cf. Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974); *American Can Co.* v. *Oregon Liquor Control Com'n,* 15 Ore. App.

618, 517 P.2d 691 (1973). In any event, the landfill preservation, and health and environmental objectives of chapter 363 cannot be rigidly separated in the manner assumed by appellants' argument. It is at precisely the point when existing capacity has been exhausted that landfills present the most severe threat to public health and the environment. As noted by the Supreme Court of New Jersey, even at the present time ". . . many landfills within the State are located within ecologically sensitive areas, such as floodplains, wetlands, or on State-owned public trust tidelands." (App. 40). It is clearly desirable to discontinue or at least to limit the use of such landfills. However, the plain fact is that the exhaustion of available landfills space through overutilization increases the risk that disposal in the most environmentally sensitive areas will have to be increased. As noted by the Supreme Court of New Jersey, ". . . it is entirely reasonable to forecast that the extension of the lifespan of existing landfills, resulting from the exclusion of out-of-state waste, may be of crucial importance in preventing further virgin wetlands or other undeveloped lands from being devoted to landfill purposes." (App. 43). In short, there is a direct and immediate relationship between the legislative objectives of preserving existing landfill space for the maximum period possible and minimizing the health and environmental dangers of landfills.[11]

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[11] Although this claim was nowhere made in their previous briefs filed with the Court, appellants have now asserted that the motivation for enactment of chapter 363 was economic rather than environmental. This belated assertion is frivolous. The primary authority for the assertion is a press release by the then Acting Governor which the appellants apparently located in the archives of the New Jersey State Library in Trenton, New Jersey. Initially, it should be noted that this document is not part of the record. In any event, the part

(Footnote continued on following page)

Therefore, the appellants have failed to set forth any grounds for questioning the findings of the New Jersey Legislature and Supreme Court of New Jersey that the disposal of waste in landfills represents a present threat to the health and environment of the inhabitants of New Jersey.

It also is fully consistent with the Commerce Clause to deal with this problem by taking reasonable steps to reduce the overall volume of waste being disposed on New Jersey land. Thus, in *Bradley* v. *Public Utility Com'rs,* 289 U.S. 92 (1933), the Court rejected a Commerce Clause challenge to the denial by the Ohio Public Utilities Commission of a certificate of convenience and necessity to operate an interstate bus route based upon the fact that the highway over which the service was to be conducted was already overly congested. In a unanimous opinion written by Justice Brandeis, the Court said that "[s]afety may require that no additional vehicle be admitted to the highway" (289 U.S. at 96), even though the effect was to absolutely prevent the operation of the proposed new interstate bus route. If such a restriction may be im-

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(Footnote continued from preceding page)

of that document selectively quoted in the text is strikingly different from the full document, quoted in footnote 10 of appellants' brief, which leaves no doubt that the essential purpose of the bill was protection of the New Jersey citizenry from the grave environmental and health dangers caused by the land disposal of waste. The quotes attributed to the sponsor of A-1132 and former Governor Cahill on pp. 7-8 of appellants' brief and the selections from the Pereira deposition (App. 181-187) have been similarly pulled out of context. Finally, a reading of the entire Basis and Background Statement (App. 148-166), rather than simply the short passage quoted by appellants, leaves no doubt that the essential objectives of the State in the enactment of chapter 363 and the implementing regulations was the protection of public health and the environment.

posed on a basic instrumentality of interstate commerce, it follows *a fortiori* that the transportation into a state of waste intended for dumping may be prohibited so as to reduce the overall magnitude of an established public health and environmental problem.

This case is similar in many respects to *Hughes* v. *Alexandria Scrap Corp.,* 426 U.S. 794 (1976). *Hughes* involved the environmental hazard of disposing of abandoned automobiles; this case deals with the environmental hazard of disposing of all forms of solid wastes. In *Hughes,* the State of Maryland pursued its environmental interests in part by a statutory system of bounties designed to encourage the recycling of abandoned automobiles. To prevent state funds from being dissipated by payments for automobiles abandoned in other states, it enacted amendments which had the practical effect of restricting the bounties to Maryland processors. This made it economically impractical for out-of-state processors to compete with Maryland processors in the purchase of abandoned automobiles from wreckers thereby substantially reducing this form of interstate commerce. The Court upheld this legislation essentially on the theory that the payment of bounties by the State to further its environmental interests was not the kind of action with which the Commerce Clause is concerned. Since New Jersey has pursued its environmental interests in limiting the ruin of its land by landfill operations by prohibiting the transportation into New Jersey for disposal of waste originating out of state, rather than expending state funds for this purpose, the subsidy rationale of *Hughes* is not directly applicable. However, the underlying purpose ". . . of protecting the State's environment" (*Id.* at 809) is common to the two statutes, and there are a number of significant respects in which the New Jersey statute implicates the free market principles of the Commerce

Clause to a lesser extent than did the Maryland statute. First, whereas the Maryland statute confers an economic advantage upon Maryland processors to the detriment of out-of-state processors, the New Jersey statute creates no economic preference for local economic interests. On the contrary, some of the appellants are New Jersey landfill operators who claim that they will lose business as a result of New Jersey's effort to protect its environment. Secondly, whereas the recycled scrap metal affected by the Maryland statute was indisputably an appropriate subject of interstate commerce, the New Jersey statute does not affect any materials intended for re-cycling but rather is limited to the disposal of waste.[12] Finally, whereas it was cogently argued in *Hughes* that Maryland's environmental interests could be pursued equally effectively with less impact upon interstate commerce, there is no reasonable alternative available to New Jersey to reduce the overall quantity of waste being dumped within its borders. Therefore, the exclusion of out-of-state waste transported for disposal within New Jersey is more clearly compatible with the free market objectives of the Commerce Clause than the program of economic subsidization for the recycling of abandoned automobiles upheld in *Hughes* v. *Alexandria Scrap Corp.*

Finally, even if there were some doubt concerning the compatibility of chapter 363 with the Commerce Clause,

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[12] Appellants argue that chapter 363 on its face purports to be a prohibition on the entry of all solid and liquid wastes (except garbage for swine) for any purpose whatsoever. However, the Supreme Court of New Jersey recognized that the statute must be read with the regulations promulgated pursuant thereto prior to its effective date as only applicable to waste destined for disposal. The Court is bound by this interpretation of chapter 363 of the Supreme Court of New Jersey. *Smiley* v. *Kansas,* 196 U.S. 443, 455 (1904).

that doubt would be put to rest by the fact that Congress has recently enacted comprehensive legislation dealing with the problems of solid waste disposal without undertaking to force states to allow their land to be used for the disposal of waste originating out of state. It is firmly established that "Congress has . . . power to define the distribution of power over interestate commerce." *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n,* 332 U.S. 507, 521 (1947). See also *Prudential Ins. Co.* v. *Benjamin,* 328 U.S. 408 (1946); *Parker* v. *Brown,* 317 U.S. 341 (1943); *In re Rahrer,* 140 U.S. 545 (1891). As discussed in greater detail in Point I, the Resource Conservation and Recovery Act represents a clear congressional determination that the problems of waste disposal are primarily of local rather than national concern, thus strongly supporting the conclusion that waste disposal is a subject within the local police power which does not implicate any substantial national interest in the maintenance of an open economy. Furthermore, the Act expressly recognizes that solid waste should only be disposed on the land in accordance with careful governmental planning and management at the state and local level, thus supporting the conclusion that patterns of waste disposed are too important to public health and the environment to be left to the unregulated whims of the marketplace. The Act thus reinforces the conclusion that chapter 363 is consistent with the Commerce Clause.

The appellants, in seeking to avoid the line of cases holding that the Commerce Clause does not prevent the states from enacting legislation to protect the health, safety and welfare of their citizens, rely on cases which have no bearing upon the restrictions which the Commerce Clause places on the states, but deal instead with the breadth of the power which the clause confers upon

Congress. See *e.g. United States* v. *Pennsylvania Refuse Removal Association,* 242 F. Supp. 794 (E.D. Pa. 1965), aff'd 357 F. 2d 806 (3rd Cir. 1966), cert. den. 384 U.S. 961 (1966). Thus, the Court has held that Congress has the power under the Commerce Clause to enact legislation prohibiting the interstate transportation of prostitutes (*Hoke* v. *United States,* 227 U.S. 308 (1913)) and kidnapped persons. *Gooch* v. *United States,* 297 U.S. 124 (1936). However, it would be ridiculous to suggest that the Commerce Clause may be invoked to prevent action by the states to combat these evils. Therefore, although *United States* v. *Bishop Processing Company,* 287 F. Supp. 624 (D. Md. 1968), *aff'd* 423 F.2d 469 (4th Cir.), *cert. den.* 398 U.S. 904 (1970), recognized that the movement of air pollutants across state lines provides an adequate jurisdictional basis under the Commerce Clause for the enactment of the Clean Air Act (42 U.S.C. §1857, *et seq.*), this does not mean that the Commerce Clause would present an obstacle to the enactment of legislation by New Jersey to prevent all of Pennsylvania's air pollution from being collected and shipped to New Jersey for release on the property of a well-paid entrepreneur. Similarly, if the ships in *Huron Portland Cement* v. *City of Detroit,* 362 U.S. 440 (1960) were collecting all of the smoke which was produced while steaming the Great Lakes and were releasing it in Detroit Harbor, an ordinance prohibiting such a practice would not be struck down by the Court. The cases dealing with the reach of congressional power under the Commerce Clause are thus inappropriately relied upon by the appellants. *Cf. Douglas* v. *Seacoast Products, Inc.,* 431 U.S. 265, 282 n. 17 (1977); *Hipolite Egg Co.* v. *United States,* 220 U.S. 45, 57-58 (1911).

The appellants also rely on the "natural resource" cases to support their attack upon chapter 363. *Pennsylvania* v.

West Virginia, 262 U.S. 553 (1923); *West* v. *Kansas Nat. Gas Co.,* 221 U.S. 229 (1911). However, these cases all dealt with statutes which attempted, as described in *Pennsylvania* v. *West Virginia,* "to regulate the interstate business to the advantage of the local customers." 262 U.S. at 597-598. Furthermore, it is clear that natural resources such as oil and gas, are located in some states but not in others, and that restrictions upon interstate commerce in resources would have an adverse impact upon the national economy. See *Oklahoma* v. *Kansas Nat. Gas Co.,* 221 U.S. 229, 255 (1911). No comparable claim can be made with respect to the disposal of waste. It is also clear that disposal of waste presents immediate problems with respect to health and environment which were not present in the "natural resource" cases. Therefore, these cases involve, under the analysis contained in *H.P. Hood & Sons* v. *DuMond, supra,* state regulation to ". . . constrict the flow of . . . commerce for [local] economic advantage . . .", not an attempt by the State ". . . to shelter its people from menaces to their health or safety. . . ." 336 U.S. at 533.

It is also significant that Pennsylvania does not take the same cavalier attitude towards the health and environmental dangers of landfills manifested by Philadelphia's brief when the landfills are located on the Pennsylvania side of the border. On the contrary, Pennsylvania law leaves political subdivisions of that state free to exclude waste originating outside of their boundaries. As stated in the affidavit of the Commissioner of Streets of the City of Philadelphia:

> "13. Sanitary landfills in Pennsylvania are not public utilities. The Pennsylvania Department of Environmental Resources has been legislatively em-

> powered to regulate such facilities, but cannot compel same to accept solid waste from any source whatever." (App. 221;[13] See also App. 249-252).

The appellant Pennsylvania political subdivision is thus in the anomalous position of invoking the Commerce Clause as a sword to force New Jersey to accept its waste in an effort to solve disposal problems caused by the laws of its own state which allow the immediately surrounding Pennsylvania political subdivisions to exclude Philadelphia waste.[14] This circumstance serves to underscore the fact that what is involved in this case is not preservation of an open national economy but an attempt by a political subdivision of one state to use the soil and environment of a sister state in the discharge of its obligation under the police power to provide for the disposal of the waste of its inhabitants. *Clason* v. *Indiana, supra.*

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[13] By contrast, New Jersey has comprehensive legislation regulating disposal of waste which prohibits one political subdivision from excluding solid waste originating in another political subdivision. N.J.S.A. 48:13A, *et seq.* (Solid Waste Utility Control Act, 1970); N.J.S.A. 13:1E-1, *et seq.* (Solid Waste Management Act of 1970); See *So. Ocean Landfill* v. *Mayor & Coun. Tp. of Ocean,* 64 N. J. 190, 314 A2d 65 (1974).

[14] As in Pennsylvania, the majority of states permit local political subdivisions to prohibit the disposal of waste originating outside of their boundaries. Since such local ordinances may be effectively used to exclude waste originating out of state, the statement in appellants' brief to the effect that only seven states prohibit the disposal of waste originating out of state (appellants' brief, at 33, n. 26) is quite misleading. In fact, the need for such provisions probably only arises in states such as New Jersey which have enacted legislation providing for intrastate regional waste disposal planning.

Indeed, where efforts by one state, or its political subdivisions, to dispose of waste in a manner harmful to the inhabitants of another state have come before the Court, it has not been the disposing states which have sought to invoke the Commerce Clause as a license for the exportation of their waste problems, but rather the recipient states that have brought original actions, often successfully, against the disposing states to prevent actions harmful to their health and environment. See, *e.g., Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972); *New Jersey* v. *New York City,* 283 U.S. 473 (1931); *North Dakota* v. *Minnesota,* 263 U.S. 365 (1923); *New York* v. *New Jersey,* 256 U.S. 296 (1921); *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230 (1907); *Missouri* v. *Illinois & Chicago District,* 180 U.S. 208 (1901). The Court in *Georgia* v. *Tennessee Copper Co., supra,* in granting an injunction to prevent a Tennessee company from discharging noxious gas from its factory into Georgia, appropriately noted that:

> "It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulfurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards should not be endangered from the same source." 206 U.S. at 238.

If conduct offensive to New Jersey took place solely in Pennsylvania as, hypothetically, by the appellants projecting their waste across the Delaware River into New Jersey, it would require such an action for New Jersey to protect the interests of its inhabitants. However, since

the actual method of the disposal of Pennsylvania waste in New Jersey involves conduct within the jurisdiction of New Jersey, it was able to deal with the problem directly through prohibitory legislation. In any event, the point is that actions by one state which adversely affect the air, land and water of another state have never been conceived to be protected by the Commerce Clause.

In sum, this case simply does not involve the national interest in the maintenance of an open economy which the Commerce Clause was designed to protect. Rather, it involves the fundamental responsibility of a state to provide for the disposal of waste generated by its inhabitants with the least possible adverse impact upon health, the environment and land use. Therefore, the Court should affirm the conclusion of the Supreme Court of New Jersey that a state may prohibit the use of its land as a disposal site for waste generated within a political subdivision of another state.

POINT III

The record before the Supreme Court of New Jersey provided a reasonable basis for sustaining the legislative finding that the public health and environmental problems caused by landfills are exacerbated by forcing New Jersey to accept waste generated out of state and thus there was no need for a plenary hearing before the trial court.

Appellants' final argument is that the Supreme Court of New Jersey somehow thwarted their efforts to develop a full record and thereby denied them due process of law. This contention is frivolous.

It was appellants' trial strategy which determined the course of proceedings in the state courts. Soon after the filing of their complaint, the appellants moved for summary judgment ". . . only upon the issues of federal preemption and discrimination against interstate commerce . . ." (App. 189) and the State cross-moved for summary judgment. Thus the essential thesis upon which the matter was submitted to the trial court was that, regardless of the impact upon public health and the environment, if New Jersey permitted the dumping in landfills of waste originating within the state, it was also obligated by the Commerce Clause to accept out-of-state garbage for dumping in its landfills. On the appeal by the State to the Supreme Court of New Jersey, appellants again essentially relied upon the thesis that chapter 363 violated the Commerce Clause by "discriminating" against waste originating out of state. No serious question was raised as to the validity of legislative findings that environmental degradation was being aggravated by the dumping in New Jersey of wastes originating out of state. Nor did the appellants pursue, as alternative grounds

for affirmance, any of the other legal theories which had been projected in shot gun form in their original complaint.[15] Rather, it was only after the Supreme Court of New Jersey had issued its opinion upholding the constitutionality of chapter 363 that the appellants, on a motion for remand to the trial court, first raised questions concerning the finality of the judgment (App. 216-218). The Supreme Court of New Jersey, over the strenuous objections of the State, granted this motion for remand ". . . for such further proceedings, if any, that that court may deem appropriate . . ." (App. 299). Therefore, assuming that any facts remained to be heard, the appellants were given an opportunity to develop those facts. However, the appellants deliberately elected not to proceed before the trial court and instead to enter into a consent dismissal with prejudice. As conceded by counsel for appellants at the prior oral argument before the Court, the appellants thus waived any right they might have had to pursue other counts of their original complaint (Transcript, p. 25).

There is, therefore, absolutely no factual basis for the appellants' contention that they were denied due process of law by the course of proceedings in the state courts.

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[15] It is well established under New Jersey practice that a judgment may be supported on appeal not only on the grounds relied by the lower court but on any other grounds which will support the result. *Irving Isko* v. *Planning Bd. of Tp. of Livingston*, 51 N. J. 162, 175. 238 A2d 457, 464 (1968). It is also a fundamental policy of state judicial administration that all aspects of a controversy should be joined together in a single legal proceeding so as to avoid the delay and wastage incident to the fragmentation of litigation. *Falcone* v. *Middlesex County Med. Soc.*, 47 N. J. 92, 219 A2d 50 (1966). This means that where feasible a party who has prevailed in a lower court on one of several alternate theories should present any theory which might support the judgment to an appellate court.

Rather, the appellants properly may be bound to the record as they elected to develop it in the state courts. As the court stated in *Reid* v. *Colorado*, 187 U.S. 137, 152 (1902) in a related context:

> "The accused seems to have been content to rest his defense upon such grounds as arose upon the face of the local statute, without reference to any evidence bearing upon the reasonableness or unreasonableness of the particular methods adopted by the state to protect its domestic animals. He seems to have been willing to risk the case upon the simple proposition—based upon the words of the state enactment and upon the act of Congress, reinforced by certain regulations made by the Agricultural Department—that the local statute was inconsistent with that act, and with the general power of Congress to regulate interstate commerce.
>
> "As therefore, the statute . . . only prescribes certain methods to protect the domestic animals of Colorado from contact with live stock coming from that territory between certain dates, and as those methods have been devised by the state under the power to protect the property of its people from injury, and do not appear upon their face to be unreasonable, we must, in the absence of evidence showing the contrary, assume that they are appropriate to the object which the state is entitled to accomplish."

Appellants' explanation for their failure to pursue the remand to the trial court is to say that they needed an injunction against the effectiveness of chapter 363 and, since the Supreme Court of New Jersey had foreclosed the grant of that relief in the state system, it was not

in their strategic best interest to continue with state court proceedings. However, appellants' strategic situation did not differ from that of any other party who has been denied preliminary injunctive relief by a state court, since the right of appeal from the state courts to the Supreme Court of the United States is limited under 28 U.S.C. §1257(2) to final judgments. Therefore, if there were any substance to appellants' argument, 28 U.S.C. §1257(2), to the extent it permits appeals to the Supreme Court of the United States only from final judgments, would be subject to attack on due process grounds. The Court therefore should reject the appellants' attempt to characterize the end result of their own procedural maneuvering as a denial of due process by the Supreme Court of New Jersey.

Most importantly, even apart from the fact that it was appellants' trial strategy which determined the course of proceedings in the state courts, it is clear that the Supreme Court of New Jersey based its decision upon a fully adequate record. As discussed in Point II, the Supreme Court of New Jersey had before it the Basis and Background Statement of the New Jersey Department of Environmental Protection, the report of the State of New Jersey County and Municipal Government Commission entitled *Solid Waste: A Coordinated Approach* (1972), the affidavit of the Chief of the New Jersey Bureau of Solid Waste Management and of course the court's own findings in prior proceedings. These materials showed a reasonable basis for the legislative findings that the disposal of waste causes environmental and public health problems, that there is a shortage of landfill space in the state and that the disposal of waste originating out-of-state increases the overall volume of waste dumped within the state and thereby exacerbates the state's solid waste disposal problems. The New Jersey Legislature's con-

clusions as to the dangers from solid waste disposal are re-inforced by additional documentary materials of which the Court may take judicial notice and the findings of Congress. All of these sources provide a reasonable basis for sustaining the judgment of the New Jersey Legislature in banning the dumping within New Jersey of waste originating out of state. *Evco* v. *Jones, supra; Local Union No. 10* v. *Graham, supra; Welch* v. *Swasey, supra.*

The mere fact that an opinion may have been expressed by appellants that landfills can be operated without damage to public health and the environment does not give rise to a material contested issue of adjudicative fact requiring a trial. The judgment of the New Jersey Legislature is not subject to invalidation simply on the possibility that, after a contest between expert witnesses, a court may conclude that the experts attacking the legislative judgment have made the more persuasive case. As the Court stated in *South Carolina State Highway Dep't* v. *Barnwell Bros., supra,* at 191-192:

> "[C]ourts do not sit as legislatures, either state or national. They cannot act as Congress does when, after weighing all the conflicting interests, state and national, it determines when and how much the state regulatory power shall yield to the larger interests of a national commerce.
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> "Since the adoption of one weight or width regulation, rather than another, is a legislative not a judicial choice, its constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard. . . . Being a legislative judgment it is presumed to be supported by

> facts known to the legislature unless facts judicially known or proved preclude that possibility. Hence, in reviewing the present determination we examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis."

The same principles of judicial restraint were expressed in Justice Holmes' opinion in *Hebe Co.* v. *Shaw,* 248 U.S. 297, 303-304 (1918):

> "If the character or effect of the article as intended to be used 'be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury,' or, we may add, by the personal opinion of judges, 'upon the issue which the legislature has decided.' *Price* v. *Illinois,* 238 U.S. 446, 452. . . . The answer to the inquiry is that the provisions are of a kind familiar to legislation and often sustained, and that it is impossible for this court to say that they might not be believed to be necessary in order to accomplish the desired ends."

See also *Hughes* v. *Alexandria Scrap Corp., supra,* 426 U.S. at 812-814. Similarly, since the record in the present case contains adequate support for the legislative finding that the exclusion from New Jersey of waste originating out of state reasonably would serve to protect the State's health and environment, there would be no basis for holding trial proceedings even if the appellants had not deliberately declined to avail themselves of this opportunity.

Finally, it should be noted that if any appellant landfill operator really were in a position to establish that it could conduct a disposal operation for waste originating out of state without threat to the health, safety and welfare of New Jersey citizens, it could obtain a further exemption from the prohibitory impact of chapter 363. The statute confers broad power upon the Commissioner of Environmental Protection to permit waste originating out of state to be brought into the State where he determines that this can be done ". . . without endangering the public health, safety and welfare. . . ." If any party were able to show that any exemptions from the prohibition against dumping waste originating out of state could be adopted ". . . without endangering the public health, safety and welfare . . .", it must be presumed that the Commissioner would extend the scope of the existing exemptions. Moreover, under the broad principles of judicial reviewability of administrative actions which exist in New Jersey (see *In re Senior Appeals Examiners,* 60 N.J. 356, 290 A. 2d 129 (1972)) if the Commissioner in exercising his power under the law were "arbitrary, unreasonable and capricious," his actions could be set aside on appeal to the courts. However, in the procedural posture in which appellants have placed this matter before the Court, it must be assumed, as has been found by the New Jersey Legislature and the Supreme Court of New Jersey, ". . . that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside of the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited." N.J.S.A. 13:1I-9. Therefore, the record is fully adequate to sustain the constitutionality of chapter 363.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the judgment of the Supreme Court of New Jersey should be affirmed.

JOHN J. DEGNAN
Attorney General of New Jersey
Attorney for Appellees, State of New Jersey, Department of Environmental Protection of the State of New Jersey and Commissioner of the Department of Environmental Protection of the State of New Jersey

STEPHEN SKILLMAN
Assistant Attorney General
Of Counsel and On the Brief

DEBORAH PORITZ
NATHAN EDELSTEIN
Deputy Attorneys General
On the Brief